No. 01-1127

IN THE SUPREME COURT
OF THE UNITED STATES

BILL LOCKYER Attorney General of the State of California;
ERNEST B. ROE, Warden,

Petitioners,

v.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Respondent is entitled to federal habeas corpus relief on the ground that his sentence of fifty-years-to-life in prison, imposed under California's "three strikes" statute for two current petty theft offenses, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among NACDL's objectives are to promote the proper administration of justice and to ensure that the punishment for criminal conduct fits the crime. To that end, NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including several Eighth Amendment cases. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957 (1991). Because California's application of its three-strikes law to petty offenses imposes punishment that is grossly disproportionate to those offenses, NACDL respectfully submits this brief *amicus curiae* in support of Respondent.

SUMMARY OF ARGUMENT

Andrade's petty theft offenses were not serious enough to warrant the imposition of two consecutive twenty-five-years-to-life prison sentences.

I. Proportionality review under the Eighth Amendment focuses on the crime that triggers the instant sentence. This initial inquiry requires this Court

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amicus* states that no counsel for a party authored any part of this brief and no person or entity, other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

to separate the defendant's underlying current crime from sentence enhancements related to his criminal history. Andrade's underlying current crime, petty theft, is ordinarily a misdemeanor under California law. This classification of Andrade's conduct triggers heightened concern regarding proportional punishment. Courts historically have treated misdemeanor offenses as relatively insignificant transgressions and usually required offenders only to pay a fine. One of the purposes for adopting the Eighth Amendment, in fact, was to require that judges adhere to this historical practice and to refrain from imposing lengthy prison terms upon misdemeanor offenders. This practice of punishing petty offenses more leniently than violent or otherwise serious crimes endures today.

II. Ratcheting up an offender's sentence from a maximum of one year in jail to a minimum of fifty years in prison based on his criminal history places undue weight on the offender's prior convictions. A State may not punish an individual again for his past offenses. Nor may a State punish an individual solely on the assumption that his past offenses demonstrate a propensity to commit serious crimes in the future. Rather, a State may punish recidivists more severely than first-time offenders only to the extent that their criminal record "aggravates their guilt" for committing the new offense. *Graham v. West Virginia*, 224 U.S. 616, 623 (1912).

An individual's criminal record cannot render him *fifty times* more blameworthy than a first-time offender for committing a petty offense. This ratio of criminal history enhancement to "base punishment" for

the current offense far exceeds any that this Court has ever condoned, and it is much higher than that which would be tolerated under this Court's analogous punitive-damages "disproportionality" jurisprudence. This 50-1 ratio also stands far above enhancements that California imposes on other recidivists, where the State typically doubles or triples the sentence for the underlying offense. Finally, this exorbitant enhancement imposed upon petty conduct contravenes the longstanding consensus, grounded in history and in this Court's modern Eighth Amendment precedent, that no-one who commits a non-felonious offense – no matter what his criminal history – is so culpable that he deserves a life sentence or an otherwise lengthy prison term.

ARGUMENT

The Court has established a three-step analysis for determining whether a sentence violates the Eighth Amendment.[2] The first step compares the gravity of the offense to the harshness of the penalty. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (opinion of Kennedy, J.); *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). Because this issue – particularly the effect of Andrade's

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[2] NACDL urges this Court to follow here its general practice of considering the merits of a case's constitutional issue before addressing whether that law was clearly established at some relevant time. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001) (courts should consider constitutional issue before considering whether right was "clearly established" for qualified immunity purposes). "This is the process of the law's elaboration from case to case," *id.*, and it is necessary to guide courts in their proper administration of future criminal trials.

recidivism on the gravity of his offense – is at the heart of this case, NACDL will focus its efforts toward analyzing whether a recidivist's commission of petty theft is sufficiently grave to warrant the imposition of two consecutive twenty-five-years-to-life prison sentences.

Our analysis proceeds in two steps. It mirrors the method by which this Court determined the severity of the repeat offender's crime in *Solem*, 463 U.S. at 296-97, and the means by which courts across the country every day assess the appropriate length of defendants' sentences under the federal sentencing guidelines. First, NACDL discusses the severity of Andrade's conduct – that is, the severity of the crime of petty theft. Second, it considers the effect of the defendant's criminal history on the range of permissible criminal sanctions. The extraordinary criminal-history enhancements that California is imposing here require NACDL – and will require this Court – to analyze the permissible bases of increasing recidivists' sentences in more depth than this Court has done before. NACDL's analysis leads to the inescapable conclusion that the sanction imposed here raises a strong inference of grossly disproportionality. That inference is confirmed elsewhere by the intrajurisdictional analysis contained in the Ninth Circuit's opinion and by the State's acknowledgement that its three-strikes law is "the most stringent in the nation." Petitioner's Br. at 22.

I. Andrade's Underlying Crime – the Crime Upon Which This Court Should Focus – is Relatively Minor.

This Court has emphasized that when reviewing a sentence imposed pursuant to a recidivist sentencing scheme, it "must focus on the principal [crime] – the [crime] that triggers the life sentence – since [the defendant] already has paid the penalty for each of his prior offenses." *Solem*, 463 U.S. at 297 n.21; *see also Coker v. Georgia*, 433 U.S. 584, 599 (1977) ("Coker had prior convictions for capital felonies – rape, murder, and kidnapping – but these prior convictions do not change the fact that the instant crime being punished is rape not involving the taking of a human life."). This initial inspection considers the "absolute magnitude of the crime," apart from any special characteristics regarding the offender, to determine how seriously society views the bare commission of the conduct at issue. *Solem*, 463 U.S. at 293. This inquiry, therefore, requires this Court to separate Andrade's offense characteristics from any enhancements due to his status as a repeat offender and, as a primary matter, to weigh the gravity only of the former.

A. Petty Theft is a Misdemeanor Offense Under California Law.

Petty theft is ordinarily a misdemeanor under California law, punishable by a maximum of six months in county jail. Cal. Penal Code §§ 488 & 490. When a defendant convicted of petty theft has committed certain theft-related offenses in the past, the State may treat the instant offense as a "wobbler" and

punish him as it punishes low-level felons. Cal. Penal Code § 666. But contrary to the arguments of the State and its *amici, e.g.*, Petitioner Br. at 13, this heightened potential punishment does not change the character of the defendant's offense. A statutory provision "which simply authorizes a court to increase the sentence for a recidivist . . . does not define a separate crime." *Almendarrez-Torres v. United States*, 523 U.S. 224, 226 (1999). And the California Supreme Court made it clear in 1991 that the offense commonly known as "petty theft with a prior" actually constitutes (i) the base offense of petty theft; and (ii) a sentence enhancement based on the offender's theft-based recidivism, which is codified at § 666. *People v. Bouzas*, 53 Cal.3d 467, 480 (1991). In other words, "[s]ection 666 is a sentence-enhancing statute, not a substantive 'offense' statute," and the prior conviction component of that statute is not an "element" of any offense. *Id.* at 479-80.

This is not necessarily to say that any aspect of federal law prohibits California from "double counting" an offender's recidivism in calculating his sentence under the state penal code. But it does mean that regardless of how many times the State considers a defendant's criminal history in figuring his sentence, the underlying conduct, and the underlying crime, remains the same. As this Court recently put the point, "recidivism does not relate to the commission of the offense," even when state laws are at issue. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000); *accord Almendarrez-Torres*, 523 U.S. at 230 (statutory provision that authorizes œurt to increase sentence on the basis of recidivism does not define a separate crime). Here, the underlying offenses remain misdemeanors that are

otherwise punishable by a maximum of six months each in jail. *See* Cal. Penal Code §§ 488 & 490; *see also Durden v. California,* 531 U.S. 1184, 1185 (2001) (Souter, J., dissenting from denial of certiorari) (persons sentenced under three-strikes law for petty theft commit "what would otherwise be misdemeanor theft under the California scheme").

B. The Petty Quality of Andrade's Underlying Offense Triggers More Stringent Review Under the Eighth Amendment.

California's labeling of petty theft as a misdemeanor-level transgression denotes that the offense is among the least serious types of criminal conduct, and it gives rise to a heightened concern regarding proportional punishment. Throughout history, the defining characteristic of misdemeanors has been that they are less serious transgressions than felonies and, therefore, deserving of minimal punishment. In distinguishing misdemeanors from ordinary crimes, Blackstone explained that the term "'crimes[]' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only." 4 William Blackstone, Commentaries on the Laws of England 5 (1769). Under English common law, in fact, misdemeanors "developed out of the concept of trespass, meaning transgressions against the royal peace; that is, against the state" and were "regarded primarily as a means of raising money for the crown." John Lindquist, Misdemeanor Crime: Trivial Criminal

Pursuit, *in* 4 Studies in Crime, Law and Justice 15 (1988) (internal citations omitted). "Convicted offenders could not be put to death or lose their property for committing [misdemeanors]. They were fined." *Id.* Indeed, it was "rare" to impose any sentence at all for misdemeanor conduct, and requiring an extended prison sentence certainly "would have seemed an absurd expense." *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (quoting Baker, Criminal Courts and Procedure at Common Law 1550-1800, in Crime in England 1550-1800, p.43 (J. Cockburn ed. 1977)).

One of the objectives of the Cruel and Unusual Punishments Clause of the Eighth Amendment is to require courts to adhere to this historical view. Judges at common law had great discretion in crafting punishments for misdemeanors, as opposed to felonies for which penalties were fixed by law. But, as a leading commentator has explained, these "undefined punishments" for misdemeanors

> were in practice administered lightly. The imposition of heavy discretionary punishments, such as the loss of ears or the payment of immense fines, was the primary cause of the downfall of Star Chamber; in the year of its abolition Heath J. promised that King's Bench would not make the same error. . . *The provision in the Bill of Rights (1689) against the infliction of excessive fines and cruel and unusual punishments, was clearly directed against these discretionary punishments for misdemeanour*; it did not

> affect judgments fixed by law, however cruel they were.

Baker, *supra* at 44 (emphasis added). The Framers intended the Eighth Amendment to incorporate the protections of the English Bill of Rights, *Harmelin*, 501 U.S. at 966 (opinion of Scalia, J.); *Solem*, 463 U.S. at 285 n.10, and to the extent that the scope of our Constitution's prohibition against cruel and usual punishments has diverged from its English antecedent, it has expanded to apply to certain low-level felonies. *See Harmelin*, 501 U.S. at 997-98 (opinion of Kennedy, J.); *Solem*, 463 U.S. at 286-87. Regardless of one's opinion as to the wisdom of that expansion, however, it is plain that the original intent of the Eighth Amendment required courts to review *misdemeanor* punishments for disproportionality and to afford less deference to any legislative decisions regarding appropriate punitive sanctions for the proscribed conduct than would otherwise be the case. This Court recognized as much in *Rummel v. Estelle*, 445 U.S. 263 (1980), when it acknowledged that even if the length of sentences imposed "for crimes concededly *classified and classifiable as felonies*, that is, as punishable by significant terms of imprisonment in a state penitentiary, . . . is purely a matter of legislative prerogative," a const-itutionally mandated proportionality principle may "come into play" concerning more minor infractions. *Id.* at 474 & n.11 (emphasis added).

This desire to constrain the range of punishments for misdemeanors has become firmly embedded in the "standards of decency" that prevail today. *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002). "The difference in

treatment between felonies and misdemeanors has carried over from common law to current practice, and today misdemeanors are often treated differently than felonies [in] the procedures employed in trying such cases as well as [in] the consequences of a conviction." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 15 (3d ed. 1982). Black's Law Dictionary's modern definition of misdemeanor – which is presumably definitive, *Buckhannon Bd. & Care Home Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001) – provides that a misdemeanor is "[a] crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail)." Black's Law Dictionary 1014 (7th ed. 1999); *see also United States v. Indelicato*, 97 F.3d 627, 631 (1st Cir. 1996) (reaffirming "the traditional distinction between felony and misdemeanor" conduct as "the potential for a sentence of more than one year").

Andrade's current offenses involved misdemeanor-level conduct. They were non-violent property crimes that did not involve any threat to any person, and the property involved is of minimal value (less than $100 for each offense). The relative insignificance of those offenses, coupled with the fact that his sentence is among the harshest that can be imposed under the law, raises an initial inference of gross disproportionality. The central issue in this case is whether Andrade's criminal history affects that determination.

II. Ratcheting up a Petty Offender's Sentence from a Maximum of One Year in County Jail to at Least Fifty Years in Prison Based on His Prior Convictions Places Undue Weight on His Criminal History.

The State does not really even argue that a twenty-five-years-to-life sentence for petty theft of about $75 worth of merchandise, standing alone, could survive proportionality review under the Eighth Amendment – let alone that two such consecutive sentences could withstand such scrutiny. Thus, the State apparently agrees that Andrade's sentence may be upheld only if his criminal history allows California dramatically to enhance his sentence. Put simply, the issue here is whether a State may punish a recidivist *fifty times* more harshly for engaging in illegal conduct than it would a first-time offender.

There are three ways that a State might rely on an offender's criminal history in order to increase his sentence for a current conviction. First, a State might infer from the commission of the instant offense that the offender was not sufficiently punished for his prior crimes the first time around and decide to punish him for those crimes more severely now. Second, a State might conclude that the instant infraction, coupled with his past offenses, shows that the defendant is bound to commit more crimes in the future and decide to increase his term of imprisonment solely to prevent any such future crimes. Third, a State might presume that the defendant's prior offenses render him more culpable for committing the instant infraction. To any

extent that California's three strikes law rests on either of the first two theories, it violates well-established constitutional guarantees. An analysis of this Court's precedent shows that the third theory – increased culpability – cannot support the fifty-fold enhancement that California imposes on petty thieves who have prior convictions.

A. The Double Jeopardy Clause Prohibits States From Punishing Defendants Again for Prior Offenses.

California's former Secretary of State, who was an author of the State's three-strikes law and whom the State seems to view as an authoritative voice on it, has remarked that "[w]hen three strikers are finally put away, the punishment is consideration for a career in crime, *not just the final offense.*" Bill Jones, *Why the Three Strikes Law is Working in California,* 11 Stan. L. Rev. 23, 23 (1999) (emphasis added). The California Court of Appeal likewise has explained that "[u]nder the three strikes law, defendants are punished *not just for their current offense* but for their recidivism." *People v. Cooper*, 43 Cal. App. 4th 815, 823 (1996) (emphasis added); *see also People v. King*, No. FBA05576, 2002 WL 192739, at *10 (Cal. App. Feb. 7, 2002) (same).

This desire to punish defendants for actions beyond their current offense is at best imprecise rhetoric, and at worst unconstitutional. Although this Court repeatedly has observed that States may punish recidivists more severely than first-time offenders, it is equally well established that the Double Jeopardy Clause prohibits States from punishing defendants

again for prior offenses. *North Carolina v. Pearce,* 395 U.S. 711, 717-18 (1969); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874). This Court, therefore, has explained that a three-strikes type sentence is valid only if "the defendant is still being punished *only for the offense of conviction*." *Witte v. United States,* 515 U.S. 389, 402 (1995) (emphasis added). The recidivism enhancement cannot be treated "as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke,* 334 U.S. 728, 732 (1947); *see also Witte*, 515 U.S. at 400, 403 (criminal history enhancement valid because "the offender is still being punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment") (emphasis added); *Graham v. West Virginia,* 224 U.S. 616, 623 (1912) (Repeat offenders "are not punished the second time for the earlier offense"); *Moore v. Missouri,* 159 U.S. 673, 677 (1895) (same). If a California court permits its law to reach beyond those confines, it violates the Double Jeopardy Clause.

One aspect of California's three-strikes law, in fact, gives rise to a particular concern that it is placing undue weight on offenders' past crimes. The three-strikes law requires a defendant's first two "strikes" to be "serious" or "violent" felonies, but his third strike may be any felony at all, or even an enhanced misdemeanor such as petty theft. *See* Cal Penal Code §§ 667(e)(2)(A) & 1192.7. Therefore, a person who has committed two "serious" felonies in the past and whose third crime is a non-serious and non-violent felony (or an elevated misdemeanor) receives a twenty-

five-year minimum sentence. Yet a person who commits the same three crimes but in a different order is not subject to the three-strikes law. Even though the latter person's current crime is *more serious*, he is subject to a *shorter* sentence. This outcome-determinative influence of the character of repeat offenders' past crimes, instead of their current crime, suggests that the State is treating past crimes as more than simply a factor that aggravates the severity of a new crime.

B. The Due Process Clause and the Eighth Amendment Prohibit States from Punishing Defendants Solely for a Propensity to Commit Future Offenses.

It appears that another of California's goals in sentencing petty offenders like Andrade to such lengthy sentences based on their prior offenses is to foreclose the possibility they might commit future crimes. *See* Petitioner's Br. at 23. The California Court of Appeal has observed that "[t]he three strikes law is the Legislature's attempt to address the threat to society posed by the class of persons *previously* convicted of serious or violent felonies." *Cooper*, 43 Cal. App. 4th at 829 (emphasis added); *accord People v. Ingram*, 40 Cal. App. 4th 1397, 1415-16 (1995). The three-strikes law's co-author put the point in more concrete terms: "The simple goal of Three Strikes is public safety. It is far better, for example, to remove a child molester from the streets for the commission of a so-called lower level felony than to wait for the offender to abuse another victim." Jones, 11 Stan L. Rev. at 25. This theory, applied to this case, seems to be that if a petty thief has committed more serious

offenses in the past, the State may put him in prison "not so much [due to] the new crime he committed," but rather because he presumably will commit a more serious crime in the future. *People v. Edwards,* 97 Cal. App. 4th 161, 165-66 (2002).

Once again, the Constitution precludes this Court from upholding the three-strikes law on this basis. It is a fundamental precept of due process that the government may not punish individuals simply for their propensity to commit future crimes. As Justice Holmes explained long ago: "Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after to-morrow. The law only deals with conduct." Oliver Wendell Holmes, The Common Law 65 (1923 ed.). Justice Black later described "punishment for a mere propensity, a desire to commit an offense" as "a situation universally sought to be avoided in our criminal law." *Powell v. Texas,* 392 U.S. 514, 543 (1968) (Black, J., concurring). This Court applied this principle in *Robinson v. California,* 370 U.S. 660 (1962), holding that the Eighth Amendment prohibits a State from punishing an individual for the "status" of being addicted to narcotics. Justice Harlan explained that "[s]ince addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of [the state law] was to authorize criminal punishment for a bare desire to commit a criminal act." *Id.* at 678-79 (Harlan, J., concurring).

To be sure, once a defendant commits a criminal act, his future dangerousness may figure into the length of his sentence. *See, e.g., Simmons v. South Carolina,* 512

U.S. 154 (1994). But the resulting sentence still may punish him only to the extent otherwise justified by the actual criminal act and by customary principles of just desserts. *See Witte*, 515 U.S. at 399 ("evidence of related criminal conduct [may] enhance a defendant's sentence for a separate crime *within statutory limits*" for the separate crime) (emphasis added); *cf. Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991) (defendant's propensity to commit crime may not factor into a jury's determination of guilt for current crime). A desire to incapacitate, in other words, may figure into a State's penological policies, but it may not *alone* justify a person's imprisonment when there is no other legitimate basis for punishing him.

In recent years, States have tested the outer boundaries of this principle by enacting so-called sexual predator statutes, which incapacitate persons deemed to have mental defects that render them likely to engage in future violent acts. *See Kansas v. Crane*, 122 S. Ct. 867, 870 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986). These state laws, like California's three-strikes enhancement, rely in part on "prior criminal conduct" as an indicator of offenders' propensity to future commit crimes. *See Hendricks*, 521 U.S. at 362; *Allen*, 478 U.S. at 371. In upholding these sexual predator laws, moreover, this Court has held that the Constitution permits States to incapacitate sex offenders beyond their prison terms for their underlying crimes.

But sexual predator laws, in contrast to California's three-strikes law, impose *civil commitment* that must terminate upon successful treatment, not an

additional *punishment* of a prison term that need not even include rehabilitation. This is a critical distinction. In upholding the sexual predator laws, this Court has deemed it pivotal that they do not exact punishment for the offender's past acts. *See Crane,* 122 S. Ct. at 870; *Seling v. Young*, 531 U.S. 250, 262 (2001) (purpose is "not to punish"); *Allen*, 478 U.S. at 371 (evidence of prior criminal conduct was not used "to punish past misdeeds"). An individual sentenced pursuant to California's three-strikes law, however, is indisputably punished, and if his triggering offense is petty theft, he is confined "not so much [for] the new crime he committed," but rather because the State assumes that he will commit a more serious crime in the future. *Edwards*, 97 Cal. App. 4th at 165-66; *see also* Petitioner Br. at 23; Jones, 11 Stan L. Rev. at 25. This predominant focus on incapacitation treads on bedrock due process principles and, thus, cannot provide a valid basis for sustaining the three-strikes law.

C. An Individual's Criminal History Cannot Make Him Fifty Times More Culpable Than a First-Time Offender for Committing a Nonviolent Criminal Act.

Because California may not punish defendants under its three-strikes law for their past or predicted future crimes, the enhancement mandated by Cal. Penal Code § 666 and the three-strikes law may be based only on the defendant's heightened culpability for the instant crime. This Court's justifications for recidivism enhancements, in fact, have consistently rested on this basis. Over a century ago, this Court explained that a repeat offender, "by his persistence in

the perpetuation of crime, . . . has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense." *Moore,* 159 U.S. at 677; *Graham.,* 224 U.S. at 623 ("[R]epetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."). In recent years, this Court likewise has held that a repeat offender "is still being punished only for the fact that the present offense was carried out in a manner that warrants increased punishment." *Witte,* 515 U.S. at 403.

The issue here thus becomes whether Andrade's "repetition of criminal conduct," *Graham,* 224 U.S. at 623, when he shoplifted the videotapes renders him *fifty times* more culpable than a first-time shoplifter. Three guideposts suggest that is does not: (1) the ratio between the minimum sentence Andrade must serve and the maximum punishment for petty theft is exorbitant; (2) this same ratio is wholly out of line with the multiplier that California itself ordinarily imposes on repeat offenders; and (3) no petty offender, no matter what his criminal history, can be so culpable as to warrant a prison term that is measured in decades.

1. The ratio of the minimum sentence Adrade must serve to the maximum penalty for his underlying crimes is exorbitant and far exceeds any that this Court has ever approved.

This Court recently reaffirmed that "[p]ro-portionality review under" the Eighth Amendment

"should be informed by '"objective standards to the maximum possible extent."'" *Atkins v. Virginia,* 122 S. Ct. 2242, 2247 (2002) (quoting *Harmelin,* 501 U.S. at 1000 (quoting in turn *Rummel,* 445 U.S. at 263)); *accord Solem,* 463 U.S. at 292. In order to serve the same goal in the context of reviewing the proportionality of punitive damages awards, this Court has adopted the objective criteria of ratios. *See BMW v. Gore,* 517 U.S. 559, 580-81 (1996). Comparing the harm caused or threatened to the victim to the amount of exemplary damages helps show whether there is a "reasonable relationship" between the defendant's underlying act and the punitive enhancement. *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993)).

It is appropriate to undertake a comparable inspection here. Punitive damages are "quasi-criminal," *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19 (1991), and this Court has held that the "same general criteria" that determine whether a criminal sentence is "grossly disproportionate" also determine whether a punitive award is excessive. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 434-45 (2001) (citing *Solem,* 463 U.S. at 290-91, 293, 303); *see also Solem,* 463 U.S. at 292 ("Comparisons can be made in light of the harm caused or threatened to the victim or society."). This Court also has indicated that a criminal enhancement based on prior criminal conduct should bear a reasonable relationship to the punishment for the underlying current offense. *See Witte,* 515 U.S. at 403 (recidivism enhancement did not "become 'a tail which wags the dog of the substantive offense'") (quoting *McMillian v. Pennsylvania,* 477 U.S. 79, 88 (1986)). Indeed, recidivism sentence enhancements are

particularly akin to punitive damage awards because such enhancements, just like punitive awards, "are specifically designed to exact punishment in excess of actual harm to make it clear that the defendant's misconduct was especially reprehensible." *Haslip*, 499 U.S. at 54 (O'Connor, J., concurring); *compare Moore*, 159 U.S. at 677 (recidivism evinces "depravity, which merits a greater punishment").

The ratio of the minimum term that Andrade must serve to the maximum punishment for his underlying offenses is 50-to-1.[3] Each of Andrade's petty thefts alone carries a maximum penalty of six months in jail. When his sentence was enhanced due to his criminal history, it became two consecutive 25-year prison sentences. (Ewing's ratio between his minimum term and the maximum for his underlying offense, even assuming that it would have been charged as a felony, is at least 12.5-to-1, and is perhaps as high as 18.75-to-1, depending on exactly how California law would have required him to be sentenced if he had been a first-time offender.[4])

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[3] Framing the ratio comparison this way gives the maximum possible benefit to the State. If one were to compare the actual maximum term that an offender would serve (instead of the statutory maximum) for petty theft to the minimum term under the three-strikes law, the ratio would rise to 75-to-1. California law mandates that individuals receive "good time" credit for one-third of their six-month sentences. *See* Cal. Penal Code §4019.

[4] Ewing's current crime is grand theft. That crime is a "wobbler" under California law, which is punishable either as a misdemeanor with a one-year maximum jail sentence, or as a felony. If treated as a felony, the offense is generally punishable by two years in prison unless a judge finds a mitigating circumstance, in which case the punishment is 16 months. Cal. Penal Code §489(b); Cal.

The ratio here is much higher than the ratio in any recidivist sentence that this Court has ever condoned. Most recidivism enhancements that this Court has upheld do no more than double the maximum sentence for the underlying crime, and none even approaches the severity of the enhancement here. These ratios are set forth in the margin.[5] The ratio in *Rummel,* for instance, between the defendant's

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Rules of Court 4.420(a). Ewing's crime had one mitigating circumstance: he was suffering from physical conditions (AIDS and a drug addiction) that significantly reduced his culpability, so it appears likely that, as a first-time offender, he would have received a 16 month sentence. *See* Cal. Rules of Court 4.423(b)(2). While it is also true that sentences for grand theft may be enhanced to three years if certain aggravators are present, *see* Cal. Rules of Court 4.421, the only potentially aggravating factors attendant to Ewing's crime relate to his recidivism and, thus, do not measure the potential sentence of a first-time offender. *Solem*, 463 U.S. at 293. (Furthermore, the aggravating factors unrelated to recidivism appear to be subject to the *Apprendi* requirements, and none were charged or proven here.)

[5] *See Monge v. California,* 524 U.S. 721 (1998) (2.2-1; current crime punishable by 5 years); *Witte v. United States,* 515 U.S. 398 (1995) (less than 1:1; sentence enhanced within guideline range for current offense); *Parke v. Raley,* 506 U.S. 20 (1992) (2:1; current crime punishable by 5 years); *Gryger v. Burke,* 334 U.S. 728 (1948) (10 year maximum sentence increased to life imprisonment); *McDonald v. Massachusetts,* 180 U.S. 311 (1901) (sentence for four current felonies was increased to life imprison based on two past offenses; maximum for current felonies not stated, nor is parole eligibility discussed); *Moore v. Missouri,* 159 U.S. 673 (1:1; current crime was punishable by life). The Model Sentencing and Corrections Act also provides that no sentence enhancement on the basis of recidivism may more than double the maximum sentence for the underlying crime. *See* 10 Uniform Laws Annotated, Model Sentencing and Corrections Act § 3-104 (2001).

minimum term of years and the maximum sentence for his current underlying crime was 1.2-to-1. The defendant was eligible for parole after twelve years, and the maximum sentence for his underlying current crime would have been ten years in prison. *Rummel*, 445 U.S. at 266, 276, 280. The largest prior ratio between a defendant's life sentence and the maximum sentence for his current underlying crime was life-to-five-years. *Graham*, 224 U.S. at 621. The *Graham* Court did not say whether or when the defendant was eligible for parole. In *Solem*, however, the defendant also had a life-to-five-years ratio without the possibility of parole, and this Court found the sentence excessive. If one assumes that life-to-five years is a borderline case that depends on parole eligibility and other factors, it seems apparent that Andrade's life-to-six-months enhancement is so much more severe that it cannot stand.

The enhancement ratio that California imposes on third-strike petty offenders like Andrade far exceeds even those that the Due Process Clause would tolerate in the punitive damages context, where money, not personal liberty, is at stake. This Court's punitive damages jurisprudence has reaffirmed that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," and it has held that more passive actions may not be punished as severely as those that threaten personal harm. *BMW*, 517 U.S. at 575-76 (citing *Solem*, 463 U.S. at 292-93). The federal courts of appeals thus have "surmise[d]" from this Court's proportionality jurisprudence that when a civil defendant causes only "economic injur[ies]" that are "not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio."

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 639 (10th Cir. 1996); *accord Neibel v. Trans World Assur. Co.,* 108 F.3d 1123, 1132 (9th Cir. 1997); *see also BMW,* 517 U.S. at 581 (ratio in prior economic harm case "was not more than 10-1").

Andrade's petty theft offense, like most such offenses, was not accompanied by any violence or threat of violence; it caused only easily quantifiable economic harm. Ergo, such a defendant's punishment for committing petty theft should not be enhanced by more than ten times the base sentence that a State has set to reflect the maximum harm that such an offense can cause. Indeed, because criminal sentences, unlike punitive awards, entail deprivations of personal liberty, the maximum enhancement ratio for criminal offenses that cause only economic harm should be considerably lower than 10-to-1. To hold otherwise would be to afford greater constitutional protection to corporations' pocketbooks than to individuals' personal freedom – a demonstrably absurd result.

2. California itself recognizes elsewhere in its three-strikes law that even violent repeat offenders are generally only two or three times as culpable as first-time offenders.

Two other provisions of California's three-strikes law confirm that the enhancement it imposes on repeat petty offenders grossly overstates their culpability. First, the three-strikes law provides that when a person who has been convicted of a prior

serious or violent felony commits a second such offense, his sentence for the current offense is simply doubled. Cal. Penal Code § 667(e)(1). Assuming that this enhancement reflects a reasonable approximation of the increased depravity involved in the second offense, it is impossible to understand how a person could suddenly become fifty times more blameworthy for committing a third offense.

A second provision of California's three-strikes law, in fact, reveals that not even the State really believes that an offender's culpability can increase so dramatically based on such an incremental addition to a person's criminal history. The State acknowledges that it is "appropriate" to compare Andrade's sentence to the "sentences received by more serious recidivists in California." Petitioner Br. at 22. But this comparison is jarring. The three-strikes law, when applicable, provides that the sentence for a third-time offender must be the greater of: (i) triple the maximum punishment for the current offense; or (ii) twenty-five years. Cal. Penal Code §§ 667(e)(2)(A)(i) & (ii). In other words, California itself has determined that an ex-felon who commits a third serious felony – rape or robbery, for example – is only *three times* as culpable as a first-time offender who does the same thing. Yet the law's twenty-five-year minimum sentence treats repeat offenders who commit petty offenses as if their recidivism is far more blameworthy than that of repeat offenders who persist in committing violent felonies. This scheme is perverse. If anything, a petty offense is less aggravated when committed by a repeat offender than is a serious or violent offense.

3. No petty offender – no matter what his criminal history – is so culpable that his offense warrants an extended prison term.

With the exception of California's three-strikes law, a broad consensus has developed over a long period of time that recidivist statutes that mandate life or otherwise lengthy prison terms should be applied only to repeat offenders whose current crimes, standing alone, unambiguously constitute felonies. This consensus reflects the considered judgment that an offender's culpability depends primarily on the character of his actions or threatened actions, not on intangible aspects of his status. It also finds support in this Court's jurisprudence, which has consistently distinguished between the gravity of committing felonies and non-felonies.

During the late 1800's and early 1900's, many States enacted habitual offender laws that mandated severe punishment for repeat offenders. Lawrence Friedman, Crime and Punishment in American History 161 (1993). Those laws, however, almost universally required the triggering offense to be a felony.[6] Two

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[6] Amicus was able to uncover relevant decisions from twenty-four States in the first four decades of the 1900's, and twenty-three of the habitual offender statutes that mandated life or otherwise lengthy sentences required that the triggering offense be a felony. *See People v. Wagner*, 248 P. 946, 947 (Cal. App. 1926); *Smalley v. People*, 43 P.2d 385 (Colo. 1935); *Cross v. Florida*, 119 So. 380, 381 (Fla. 1928); *State v. Lovejoy*, 95 P.2d 132, 133 (Idaho 1939); *People v. Cohen*, 8 N.E.2d 184, 184 (Ill. 1937); *Goodman v. Kunkle*, 72 F.2d 334 (7th Cir. 1934) (Indiana law); *Haley v. Hollowell*, 227 N.W. 165, 166 (Iowa 1929); *Kansas v. Close*, 287 P. 599, 600 (Kan. 1930); *Anderson v.*

decisions from that period, moreover, construed state law to forbid exactly what California is doing here – namely, elevating a misdemeanor to a felony on the basis of prior crimes, and then using that elevated offense to trigger a life sentence. *State v. Brown*, 112 S.E. 408 (W. Va. 1922); *Stover v. Commonwealth*, 22 S.E. 874, 875 (Va. 1895). These courts held that, in order to trigger such a severe sentence, each of the offender's crimes "must be a felony . . . because of the character of the offense, and not because of the character of the offender." *Stover*, 22 S.E. at 875.

In modern times, most States have continued to hew to the rule that crimes that trigger life or otherwise

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Commonwealth, 195 S.W. 794, 795-796 (Ky. 1917); *State v. Dreaux*, 17 So. 2d 559, 561 (La. 1944); *McDonald v. Massachusetts*, 180 U.S. 311, 311 (1901); *People v. Palm*, 223 N.W. 67, 67 (Mich. 1929); *State v. Lee*, 298 S.W. 1044 (Mo. App. 1927); *State v. Paisley*, 92 P. 566, 569 (Mont. 1907); *Taylor v. Nebraska*, 207 N.W. 207, 209 (Neb. 1926); *State v. Alarid*, 62 P.2d 817, 819 (N.M. 1936); *Carlesi v. New York*, 233 U.S. 51, 55-56 (1914); *North Dakota v. Malusky*, 230 N.W. 735, 736-737 (1930); *Blackburn v. State*, 36 N.E. 18, 20 (Ohio 1893); *Ex parte Bailey*, 64 P.2d 278, 280 (Ok. 1936); *State v. Smith*, 273 P. 323, 323 (Or. 1929); *Commonwealth v. Curry*, 132 A. 370, 371 (Pa. 1926); *McCummings v. State*, 134 S.W.2d 151, 152 (Tenn. 1939); *Garcia v. State*, 145 S.W.2d 180, 180 (Tx. 1940). New York's and Oklahoma's law allowed petit larceny convictions to trigger its habitual offender statute, but in that case the laws expressly limited the resultant sentence to "no[t] more than twice the longest term, prescribed upon a first conviction" and five years, respectively. *Carlesi*, 233 U.S. at 56 (quoting N.Y. Penal Law § 1941); *Bailey*, 64 P.3d at 280. Only Washington's law permitted non-felonies to trigger a life sentence under its "three strikes" statute. *Washington v. Roberts*, 275 P. 60, 61 (Wash. 1929). In 1984, however, Washington amended its law to require that all three offenses, including the triggering offense, be among a list of "most serious" felonies. *See State v. Thorne*, 921 P.2d 514, 533 & n.13 (Wash. 1996).

lengthy prison terms must be felonies because of the character of the offense, and a "clear majority" of States now expressly prohibits the "stacking" of recidivist enhancements to increase a misdemeanor to a felony and then to trigger a habitual offender law. *See Lawson v. State,* 746 S.W.2d 544, 545 (Ark. 1988) (summarizing interjurisdictional survey). Even in the rare instances when state law allows such stacking, state supreme courts have refused to allow non-felonious conduct to be punished by life or otherwise lengthy prison terms – regardless of the defendant's criminal history. The West Virginia Supreme Court, for example, has ruled that a third offense that is elevated to a felony because of a defendant's criminal history, and thereby triggers a second habitual offender enhancement, can support a one-to-eight year sentence, but cannot support a life sentence. *Compare State v. Williams,* 474 S.E.2d 569 (W. Va. 1996) (misdemeanor could lead to a one-to-eight year sentence) *with State v. Deal*, 358 S.E.2d 226, 231 (W. Va. 1987) (life sentence imposed for non-violent third offense violated state constitution's proportionality requirement).

Even the California Supreme Court, before the enactment of the current three-strikes law, held that elevating a misdemeanor indecent exposure offense "to a life-maximum felony" based on the defendant's criminal record violated the proportionality component of the California Constitution. *In re Lynch,* 503 P.2d 921, 937 (Cal. 1973). Surveying the law in other States and the position of the American Bar Association, the California Supreme Court concluded that "whatever the response appropriate to the factor of recidivism, the judgment of the Legislature as to the gravity of the act

itself should remain relatively constant," or at least bear a "reasonable relationship" to the penalty actually imposed. *Id.* at 937-38. The Court specifically noted the ABA's view that imposing a life sentence on a recidivist for committing petty larceny would be "intolerable." *Id.* at 938 n.25.

This general consensus that a criminal act ought to be a felony in and of itself in order to trigger a life or otherwise lengthy prison term also comports with this Court's jurisprudence. This Court stated in *Rummel* that States may properly conclude that persons who repeatedly commit "criminal offenses *serious enough to be punished as felonies*" may be sentenced to lengthy sentences under recidivist statutes. 445 U.S. at 276. But the Court emphasized that prosecutors retained discretion "so as to screen out truly 'petty' offenders who fall within the literal terms of the [Texas] statute." *Id.* at 281. Only when a repeat offender's current underlying crime is "concededly classified *and* classifiable as a felony," *id.* at 274 (emphasis added), this Court indicated, is it grave enough to trigger a life sentence or its approximate equivalent. Hence, this Court suggested that regardless of an offender's criminal history, a State could not label "overtime parking" a felony, and then use that infraction to trigger a life sentence. *Rummel,* 445 U.S. at 274 n.11.

This Court confirmed this "classified and classifiable" principle in *Solem.* Although South Dakota law "classified" the defendant's current underlying offense – uttering a "no account" check for $100 – as a felony, this Court strongly indicated that the conduct was not "classifiable" as a felony. The Court noted not

only that the crime lacked any violence or threat of violence and that it involved a small amount of money, but also that that sum of money was "less than half the amount South Dakota required for a felonious theft." 463 U.S. at 296 & n.20. This observation suggested that since South Dakota had not designated a minimum amount of money necessary to constitute felonious "no account" check uttering, there was a serious question whether the State really viewed the offense at issue as unambiguously non-felonious conduct. The offense, therefore, could not trigger a life sentence under a recidivist statute.

Although the State here attempts to distinguish *Solem* on the ground that "petty theft with a prior" is a felony in California, Petitioner Br. at 12-13, this Court's analysis in *Rummel* and *Solem* compels the conclusion that the State may not use such petty theft convictions, or any other passive offense that it does not unambiguously classify as a "felony," to trigger a twenty-five-years-to-life sentence under its three-strikes law. As explained above, "petty theft with a prior" is a "wobbler" that is more properly viewed as misdemeanor conduct with a sentence enhancement, not as a felony. But even if the State did classify minor shoplifting as a felony, the Eighth Amendment would still forbid punishing it so severely because it would not be "classifiable" as a felony. To hold otherwise – that petty offenses may lead to sentences of the length at issue here – would be to allow States unconstitutionally to punish past or predicted future conduct under the guise of enhancing a sentence for the incrementally aggravating factor of recidivism.

CONCLUSION

This Court should hold that Andrade's sentence violates the Eighth Amendment and affirm the Court of Appeals.

Respectfully submitted this 17th day of October, 2002.

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